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In The

Supreme Court of the United States

October Term, 1987

Otis R. Bowen, Secretary of Health and Human Services,

Petitioner,

v.

Kenneth Kizer, Director of the California Department of Health Services, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF

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QUESTIONS PRESENTED

1. Whether, when Congress has specifically permitted states to employ a separate and higher Medicaid income standard for adult couples than that used for a family of a parent and child, the Secretary may refuse to approve California's Medicaid state plan amendment establishing such a standard?

2. Whether the Secretary could disapprove California's income standard for adult couples, when that standard was formulated in accordance with an interpretative guideline promulgated by HHS' Health Care Financing Administration pursuant to authority delegated by the Secretary, when the Secretary's own regulations contemplate that states may rely upon such guidelines, and when the guideline is consistent with the language of Title XIX of the Social Security Act and is reasonably related to the purposes of the Act?

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of § 1902(a)(10)(C) of the Social Security Act ("the Act"), 42 U.S.C. § 1396a(a)(10)-(C), of § 1903(f) of the Act, 42 U.S.C. § 1396b(f), of 42 C.F.R. § 435.1007, and of California Welfare and Institutions Code § 14005.12 are set out in the Appendix to the Petition. (Pet. App. 46a-49a). Section 2373(c) of the Deficit Reduction Act of 1984, Pub.L. 98-369, 98 Stat. 1112 ("DEFRA") in its entirety, the report of the Conference Committee on that provision, 45 C.F.R. § 201.3(d), and HHS' Regional Office Manual 2572-D are set out in the Appendix to the Brief in Opposition. (Br. in Opp., App. 1-10). The ROM provision is also found at pages 18-21 of the Joint Appendix. 42 CFR § 435.814 (1980) and § 435.812 (1981), in relevant part, are set out in the Appendix to this brief.

STATEMENT OF THE CASE

Respondents take issue with Part B(2) of petitioner's statement of the case, (Pet.Br. at 10-12), and with the related material set forth at pp. 38-41 of his brief. Petitioner erroneously asserts that the State has consistently acknowledged its adult couple MNIL to be inconsistent with Title XIX and with the Secretary's regulations.

1983 Stat. Ch. 323, § 124.7(a) (Pet.Br. at 9, n.4) does demonstrate the State Legislature's awareness that the proposed amendment would likely be disapproved, at least initially, by federal authorities—a fact which is hardly sur-

prising given the position which HCFA took on the legislation during the spring of 1983. (See pp. 10-11, *infra*). Nevertheless, in § 124.7, the Legislature emphasized its intent that the statute be implemented immediately upon enactment, and that the Department of Health Services take all steps necessary to appeal an adverse determination as to its validity. The Legislature thus demonstrated its view that ultimately the adult couple MNIL, based as it was upon a HCFA guideline, would be upheld.

The subsequent actions of the Department of Health Services must be viewed in light of HCFA's repeated assertions to that agency that ROM 2572-D was no longer valid.[1] Concerned that the State would lose federal funds if the adult couple MNIL was implemented, DHS sought a "formal ruling" in an attempt to avoid implementation, *see* Cal. Welfare & Inst. Code § 11003, and explored other options for dealing with the problem. Ultimately, however, pursuant to an agreed upon court order, *Minor v. Rank*, No. H 93254-7 (Alameda County Superior Ct., 1983), DHS did implement the statute. At all stages of this proceeding, the agency defended the adult couple MNIL on the ground that it is consistent with Title XIX as construed in ROM 2572-D, and is expressly permitted under DEFRA.

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[1]The chronology set forth at pp. 39-40 of petitioner's brief is incorrect: The letter (C.A. App. 140) and decision memo referred to there were prepared in late August, 1983, after the adult couple MNIL bill was enacted.

SUMMARY OF ARGUMENT

1. The Secretary focuses almost exclusively upon the Court of Appeals' holding that ROM 2572-D has legislative effect. However, the court did not rest its judgment solely upon that ground, but also relied upon § 2373(c)(1) of DEFRA ("the moratorium"). In its report on that provision, which originated in conference, the Conference Committee specifically and expressly permitted states to adopt adult couple medically needy income levels ("MNILs") during the period of the moratorium.

Petitioner now argues for the first time that Congress only intended to permit states to establish MNILs for adult couples which would not exceed 133⅓% of the AFDC grant to a family of two. His construction of DEFRA ignores certain crucial facts: First, Congress intended to override HHS' disapproval of specific state proposals to establish adult couple MNILs, and no state was proposing to maintain a standard set below 133⅓% of the AFDC grant for two—on the contrary, California and Nebraska, the only states contemplating adult couple standards, wished to base them on the AFDC grant for three. Second, in 1981, HHS adopted regulations permitting states to adopt adult couple MNILs set at 133⅓% of the AFDC grant for two. In 1982, Congress specifically disapproved those regulations. Petitioner's reading of DEFRA would require this Court to find that Congress intended to reverse an action which it had taken only two years earlier without comment or explanation.

There is no evidence whatsoever to support petitioner's revisionist view of Congress' intent. Indeed, his construction is inherently improbable. The language of

the DEFRA conference report and the history of the moratorium provision demonstrate that Congress intended to permit states to do precisely what California has done. The court below correctly reversed the Secretary's decision disapproving the adult couple MNIL on that basis alone.

2. Although ROM 2572-D is not a regulation with legislative effect, it is an interpretative regulation entitled to deference. It is not an "informal, internal communication by [a] lower level employee", as petitioner asserts, but a guideline for approval of state Medicaid plans promulgated by the Health Care Financing Administration ("HCFA"), a "principal operating component" of HHS to which the Secretary has delegated the authority vested in him under Title XIX of the Social Security Act. Because the Secretary's own regulations contemplate that states will refer to and rely upon such guidelines in drafting their Medicaid state plans, 45 CFR § 201.3(d), the ROM provision is entitled to more than the ordinary weight accorded such regulatory materials. The Secretary could disapprove California's state plan amendment, which followed the formula set out in ROM 2572-D, only if the provision had been repealed or was inconsistent with his regulations or with the Act.

There is no evidence in the record to support petitioner's contention that the provision was repealed in 1980—a contention which was first asserted in a footnote in the petition for rehearing below. Indeed, the record is specifically to the contrary: In April, 1983, the Director of the Bureau of Eligibility, Reimbursement and Coverage, the entity within HCFA responsible for reviewing and developing Medicaid policy, stated that ROM

2572-D had not yet been repealed. And in October, 1983, the House reviewed the guideline and found it to be "sound"—a determination subsequently adopted in DEFRA.

The court below correctly held that ROM 2572-D is consistent with § 1903(f) and with 42 CFR § 435.1007. The statute uses the highest amount which would "ordinarily" be paid to a family of the same size under a state's AFDC program as the baseline for setting medically needy MNILs. The Secretary's regulation adds nothing to the statute, but simply repeats its formulation. As HCFA found in 1979, because states do not "ordinarily" pay AFDC grants to families of two adults, an MNIL based upon the AFDC grant for a family of two does not adequately take into account the needs of aged and disabled married couples.

In § 1903(f)(1)(B)(i), Congress delegated to the Secretary broad authority to set standards as necessary to resolve such disjunctions between the AFDC and Medicaid programs. In ROM 2572-D, HCFA, pursuant to the Secretary's delegation of the authority vested in him under Title XIX, properly interpreted the ambiguity inherent in the statute and the Secretary's regulation in favor of granting states flexibility to meet the needs of their aged and disabled medically needy Medicaid recipients. And in 1984, Congress ratified that interpretation when it permitted states to establish adult couple MNILs set no higher than 133⅓% of the AFDC grant for a family of three.

ARGUMENT

I. CONGRESS HAS SPECIFICALLY PERMITTED STATES TO ADOPT ADULT COUPLE MNILs SUCH AS CALIFORNIA'S

A. In the DEFRA Moratorium, Congress Repudiated HHS' Disapproval of California's and Nebraska's Adult Couple MNILs

In the conference committee report to the DEFRA moratorium, Congress disapproved HHS' "overly literal" enforcement of the "single standard" and "same methodology" language added to § 1902(a)(10)(C)(i)(III) of the Act by the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248 ("TEFRA"). The Committee made specific reference to HHS' refusal to approve "less restrictive medically needy income levels for single adults and couples" as one of the problems which would, at least temporarily, be resolved by the moratorium on enforcement of the TEFRA amendment:

> For example, . . . the Department has taken the position that the "single standard" requirement of the TEFRA amendment prohibits States from establishing less restrictive medically needy income levels for single adults and couples because this would result in differences in medically needy income levels among groups of the same family size depending on relative numbers of adults and children.
>
> The Department's overly restrictive interpretation of section 137[(b)](8) of TEFRA has posed grave administrative problems for the States and threatens to cause great hardship for applicants and beneficiaries. . . . The conferees have therefore decided to impose a moratorium on the Department's implementation of the TEFRA amendment until the Congress has an opportunity to study and legislate on the mat-

ter. H.R. Rep. 98-861, 98th Cong., 2d Sess. 1367-68 (1984) (Br.in Opp., App. 4-5).

As the language of the committee report demonstrates, Congress was not acting in a vacuum. It was addressing HHS' disapproval of specific proposals to adopt adult couple MNILS. Only two states, California and Nebraska, had proposed to do so, and each sought to establish an adult couple income standard set at 133⅓% of the AFDC grant amount for a family of three. It was these proposals which Congress wished HHS to approve.

1. California's Adoption of the Adult Couple MNIL

After California repealed its special income deduction in 1982 (Pet. Br. at 7), the MNIL for two persons was set at 133⅓% of the AFDC grant for two, or $544. In contrast, categorically needy aged, blind, and disabled couples on SSI/SSP were, at the time, receiving $838 per month to meet their non-medical needs.[2] (C.A. App. 336, 337). For the first time, as a condition of receiving Medicaid (known in California as Medi-Cal), medically needy pensioners, blind and disabled people were required to live on amounts far below that allotted to SSI recipients.

During the early part of 1983, the California Legislature's Assembly Committee on Aging and Long Term Care held public hearings on the effect of recent changes in the Medi-Cal program. Those hearings focused in large part

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[2]The amount of the SSI grant is set by federal law. States are, however, free to supplement the federal amount with state funds. 42 U.S.C. § 1382e. The combined federal-state payment is referred to as SSI/SSP (State Supplemental Payment).

on the impact of the sharp decrease in the MNIL. Aged and disabled recipients and their advocates testified that sick people were unable to afford both their non-medical expenses and their expenses for out-patient care, such as doctor's visits and prescription drugs. The testimony indicated that the reduced MNIL was exacerbating widespread mainutrition among the elderly, and, in some cases, was causing unnecessary institutionalization. (C.A. App. 337-338, 340, 611-822).[3]

As a result of the public outcry concerning the impact of the reduced income standards, (C.A. App. 338-39), the Legislature adopted a new formula to determine the MNIL for adult couples, to ensure "that the income levels for maintenance need for medically aged, blind, and disabled adults, in particular, shall be based upon amounts that adequately reflect their needs." Welfare & Inst. Code § 14005.12(a),(c), as amended by 1983 Stat. Ch. 323, § 124.6. (Pet. App. 49a).[4] The new adult couple MNIL of $709 per

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[3]The declarations found at J.A. 36-57, describing the serious hardship which the reduced MNIL caused to the individual respondents and to other aged and disabled people, are typical of the testimony at the public hearings.

[4]Petitioner contends that California could have raised its AFDC grants rather than establish an adult couple MNIL. (Pet. Br. at 8). This attempt to second guess the State Legislature, however, founders on reality. California already pays AFDC grants which are among the highest in the nation, HHS. *Characteristics of State Plans for Aid to Families with Dependent Children*. SSA No. 80-21235 (1986) and, in addition, is one of the few states to provide an automatic annual cost of living increase to its AFDC families. Cal. Welfare & Inst. Code § 11453. Moreover, there are far more AFDC recipients than there are medically needy aged and disabled couples: In September,

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month (J.A. 24) was based upon Section 2572-D of the Regional Office Manual ("ROM") promulgated by HHS' Health Care Financing Administration ("HCFA") (J.A. 18-21), which provided that states may establish adult couple MNILS set as high as 133⅓% of the AFDC grant for a family of three "in order to effectively acknowledge the greater maintenance needs of an adult as opposed to those of a child." (*Id.* at 21).[5]

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1983, for example, there were 1.6 million Californians receiving AFDC, (Cal. Department of Social Services, Statistical Services Branch, *Public Welfare in California*, Statistical Series PA3-288, Table 1 (Sept. 1983)), while there were only 110,726 aged, blind and disabled medically needy Medi-Cal recipients, (Cal. Dept. of Health Services, *Cumulative Certified CID Eligibles Excluding Unborns, July '83 through Dec. '83* (Dec. 1984)). The State could hardly have been expected to raise the AFDC grant amount for a family of two—a solution which would have necessitated adjustments for all other family sizes as well—in order to address the needs of aged and disabled Medi-Cal recipients who do not even receive AFDC benefits.

Alternatively, petitioner contends that California could have elected to pay for its adult couple MNIL with state funds. The premise of the Medicaid program, however, is that states will receive federal financial participation for Medicaid benefits provided to eligible recipients. *Harris* v. *McRae*, 448 U.S. 297, 308-11 (1980). ROM 2572-D, which formed the basis for California's legislation, provided a methodology by which the State could obtain federal assistance to meet the needs of its medically needy aged and disabled population. The State Legislature, anticipating federal funding based upon that guideline, declined to devote scarce state funds in the absence of federal sharing.

[5]Petitioner contends that the State did not rely upon the ROM provision. This argument is misdirected insofar as it is calculated to show that the principle of estoppel is inapplicable, since respondents raise no estoppel claim. See n.23, *infra*. As a factual matter, the argument is inconsistent with the terms of the state statute, which is clearly modeled upon ROM

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While California's legislation was still pending, HHS' Regional Office in San Francisco, aware that the State was preparing legislation modeled upon ROM 2572-D, requested guidance from HCFA's Bureau of Eligibility, Reimbursement and Coverage ("BERC") concerning the validity of the ROM provision. (Br. in Opp., App. 11-12). The Regional Office suggested that the ROM provision was no longer valid in light of § 1902(a)(10)(C)(i)(III) of the Act as amended by TEFRA. That provision, (Pet. App. 47a), requires state plans to describe "the single standard to be employed in determining income and resource eligibility for all such [medically needy] groups."

On April 15, 1983, in a document entitled "Policy Information For All Regions," the Director of the BERC advised the Regional Administrator: "Establishing different medically needy levels that would vary by family composition, would in effect, result in application of more than a single standard for a group," and would thereby violate TEFRA. (Br. in Opp., App. 13-14).[6] The Regional

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2572-D's formula, and with the record, which demonstrates that the Legislature was attempting to ameliorate the impact of the previous MNIL reduction in a manner which conformed to federal law as interpreted in the ROM. C.A. App. 327, 328 (letter from Director of DHS to author of bill, with analysis indicating that "the methodology proposed in [the bill] is based on [ROM 2572-D]"); Br. in Opp., App. 11-12 ("[T]he State is drafting legislation to raise the [MNILs] in accordance with ROM [2572-D]").

[6]The BERC, an office within HCFA, "reviews existing policy and develops new policy" concerning Medicaid eligibility. 46 Fed. Reg. 56929 (Nov. 19, 1981) (functions of Bureau of Pro-

(Continued on following page)

Office, in turn, advised the California Department of Health Services of HCFA's interpretation. (Br. in Opp., App. 15-16). However, the California Legislature adopted the adult couple MNIL, and the Department of Health Services subsequently submitted its state plan amendment to HHS.

2. Nebraska's Attempt to Adopt an Adult Couple MNIL

In September, 1982, the Governor of Nebraska requested permission from HCFA to raise its MNIL for the State's aged and disabled medically needy adult couples. The State noted that its MNIL of $375 per month "does not adequately reflect the needs of this group of people whether they live independently or in an alternate care facility in the community." The State proposed to adopt an adult couple MNIL set either at the State's SSI/SSP level of $552 per month, or at 133⅓% of the AFDC grant for three. (Br. of Amici Curiae Maryland et al., App. A-1). On May 16, 1983, HCFA advised the Governor that, by adopting an adult couple MNIL set at 133⅓% of the AFDC grant for three, the State would violate § 1903(f) of the Act and TEFRA's single standard requirement. (*Id.*, App. A-6).

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gram Policy, subsequently renamed BERC). *See* p. 23, *infra*. The Regional Office was required to seek BERC's guidance by 45 C.F.R. § 201.3(b) ("State plan material on which the regional staff has questions concerning the application of Federal policy is referred with recommendations as required to the central office for technical assistance.")

3. Congress Responds By Adopting the DEFRA Moratorium

Congress had been alerted to HHS' new policy repudiating ROM 2572-D, as set forth in HCFA's letter of April 15, 1983. In October, 1983, the House Energy and Commerce Committee reported a bill to the House of Representatives which permitted states to adopt an adult couple MNIL as California had done, and as Nebraska had proposed. H.R. 4136, 98th Cong., 1st Sess. § 211.

The Committee specifically approved ROM 2572-D's interpretation of § 1903(f), finding that "the policy is sound." H.R. Rep. 98-442, Pt. 1, 98th Cong., 1st Sess 51 (1983) (Br. in Opp., App. 18, 19). On the understanding that HCFA was now repudiating the ROM provision because it apparently conflicted with TEFRA's single standard requirement, the Committee stated its intent to create a limited exception to TEFRA: "In short, the Committee amendment would relax the single standard requirement only in the limited circumstance in which a State sets its medically needy income level for two adults *in excess of 133 1/3% percent of the highest cash payment ordinarily made to a family of two under the State's AFDC program.*" *Id.* at 52 (Br. in Opp., App. 20) (emphasis added). The House passed the Committee's provision in H.R. 5394, 98th Cong. 2d Sess. § 361 (1984) (Br. in Opp., App. 17).

H.R. 5394 went to conference with the Senate. The Conference Committee shared the House's concern regarding HHS' refusal to approve California's and Nebraska's proposed adult couple MNILs. However, the Committee declined to adopt the permanent but limited exception to TEFRA's single standard requirement contained in the House bill. The Committee was concerned that HHS'

"overly literal" reading of TEFRA had created "grave administrative problems for the States" and had "threaten[ed] to cause great hardship for applicants and beneficiaries" in a number of respects, including but not limited to adult couple MNILs. (Br. in Opp., App. 4-5). Therefore, the Committee determined to enact a broader but time-limited moratorium, during which the states would be permitted to adopt a variety of "less restrictive" standards and methodologies for their medically needy programs than those required by a strict reading of TEFRA. Accordingly, Congress forbade the Secretary from taking "any compliance, disallowance, penalty, or other regulatory action" against a state during a moratorium period of approximately 30 months because the state uses any standard or methodology which the Secretary considers to violate TEFRA's "single standard" or "same methodology" requirement. DEFRA, § 2373(c)(1) (Br. in Opp., App. 1).[7] Congress specifically included "less restrictive medically needy income levels for single adults and couples" in that prohibition. See p. 6, *supra*.

B. The Moratorium Addressed And Was Intended to Reverse HHS' Refusal to Approve Proposals to Establish Adult Couple MNILs Based Upon the AFDC Grant for Three

Petitioner has contended throughout that the DEFRA moratorium does not apply here. In the court below, he was content to argue that his final decision did not implicate TEFRA's single standard/same methodology lan-

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[7]Under § 2373(c)(2), the moratorium ends 18 months after the Secretary submits the report required under § 2373(c)(3). To this day, the Secretary has not submitted that report, although it was due in July, 1985.

guage, and otherwise simply to ignore the language of the Conference Report expressly permitting states to establish adult couple MNILs. In this Court, he previously argued, in addition, that the moratorium did not apply because it concerned only resources, not income standards. (Pet. at 18).[8] Now, he adopts yet another approach: He argues for the first time that Congress did intend to permit adult couple MNILs during the moratorium period, but only if they are set below 133 1/3% of the state's AFDC grant level for a family of two. The history of the moratorium provision, however, is flatly inconsistent with this explanation for two reasons: First, Congress was rejecting HHS' refusal to approve California's and Nebraska's proposals to establish adult couple MNILs based upon AFDC grants for three;[9] second, only two years earlier, Congress had disapproved HHS regulations which would have permitted states to establish adult couple MNILs at or below 133 1/3% of the AFDC grant for two. Thus, there is not a scintilla of evidence in the history of the statute to support petitioner's new version of the facts.

1. The House, which originated the legislation to permit adult couple MNILs, was reacting to HCFA's "Policy Information for All Regions" letter of April 15, 1983 asserting that ROM 2572-D was no longer valid in light of

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[8]Respondents have previously refuted that and related contentions. (Br. in Opp. at 12-15). Insofar as petitioner's brief on the merits abandons the assertions made in his petition, they are not again addressed here.

[9]No other states were attempting to adopt adult couple MNILs during the period that Congress was addressing the matter, and no states maintained such standards at that time.

TEFRA.[10] The House bill was drafted and passed hard upon the heels of that letter, and was clearly intended to repudiate the position set forth therein:

> Prior to the enactment of the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, Federal guidelines allowed States to set the medically needy income levels for two adults at an amount equal to 133 1/3 percent of the AFDC payment for a family of one adult and two children. (HCFA-ROM-31 [2572-D], June 19, 1979). This guideline recognized that a State could find that an adult had greater maintenance needs than a child, and could set its medically needy income level for two adults accordingly.
>
> *It is the understanding of the Committee that [HHS] has reversed its policy on this point and taken the position that a medically needy income level for two adults could not, consistent with Federal law, be set at an amount equal to 133 1/3 percent of the amount ordinarily paid to an AFDC family of three without income or resources. The Department's new policy appears to be that the medically needy income level for two adults may not be set higher than an amount equal to 133 1/3 percent of the amount ordinarily paid to an AFDC family of two* . . . .
>
> . . .
>
> The Committee bill makes clear that [TEFRA's] single standard requirement does not justify a rejection of the valid 1979 policy. . . . H.R. Rep. 98-442 (Br. in Opp., App. 18-19) (emphasis added).

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[10]The House bill was enacted well before December, 1983, when HCFA, in initially disapproving California's proposed state plan amendment, based its position solely on § 1903(f), rather than on TEFRA. (J.A. 25). Even then, HCFA's position was unclear: In June, 1984, the agency again relied upon TEFRA in its prehearing brief in the administrative proceeding. (C.A. App. 486-89).

In permitting states to adopt adult couple MNILs, the Conference Committee addressed the same problem with which the House was initially concerned. The Committee was also reacting to the policy set forth in HCFA's letter of April 15, 1983:

> Similarly, *the Department has taken the position* that the "single standard" requirement of the TEFRA amendment prohibits States from establishing less restrictive medically needy income levels for single adults and couples . . . . H.R. Rep. 98-861 (Br. in Opp., App. 5) (emphasis added).

In order to "reinstate the Department's previous policy", as the House proposed to do, (Br. in Opp., App. 19), the Committee did not find it necessary to amend § 1903(*f*): Like the House, the Committee had before it ROM 2572-D, in which HCFA had already interpreted that provision to permit adult couple MNILs based upon the AFDC grant for a family of three. Rather, the Committee overruled HCFA's position that TEFRA invalidated the ROM, so as to compel the agency to approve the proposals which it had previously rejected pending the outcome of the moratorium. The Committee's solution differed from the House's only with respect to its duration: The Committee preferred to "relax the single standard requirement" temporarily, while the House would have done so permanently.

2. Prior to 1981, HHS' regulations required states to use "an income standard to determine eligibility for two persons", set at the highest of the SSI grant level, the SSI/SSP level (if applicable), or the AFDC grant for two; however, if that amount exceeded the cap on federal financial participation ("FFP") set forth in 42 CFR § 435.1007, the State was permitted to set its MNIL for *all* medically needy groups at, but not below, the 133⅓% cap. 42 CFR

§ 435.814 (1980) (App. 1, hereto).[11] Under this regulation, the higher SSI/SSP grant levels (Pet.Br. at 5, n.1) worked to the benefit of AFDC-linked medically needy families of two.

In 1981, after passage of OBRA, HHS amended its regulations to permit states to use *either* a single MNIL for all medically needy groups set at the level required under its previous regulation, *or* a different standard for each covered medically needy group (i.e., aged, blind, disabled, and families with children). States which chose the latter option were required to set the standard for each group at the income standard for the cash program related to that group or, if that amount exceeded the limit on FFP, at, but not below, the 133⅓% limit. 42 CFR § 435.812 (1981) (App. 2, hereto). The effect of this regulation was to permit states to establish a lower income standard for a family of a parent and child than for a family of two medically needy aged or disabled adults, thereby making it more difficult for the AFDC-linked medically needy family to qualify for Medicaid.[12] For example, the adult couple MNIL could be set at 133⅓% of the AFDC grant for two, while the standard for AFDC-linked medically needy families could be set at 100% of the AFDC grant for two.

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[11]This regulation was based upon the statutory requirement that medically needy standards be "comparable" for all medically needy groups. *See Hogan v. Heckler*, 769 F.2d 886, 894-95 (1st Cir. 1985), *cert. den.*, 477 U.S. —, 92 L.Ed.2d 715 (1986). ROM 2572-D established a limited exception to this principle so as to permit states to achieve greater comparability between aged and disabled categorically and medically needy groups, as contemplated by the pre-OBRA language of § 1902(a)(10)(C). *Id.* at 895.

[12]A reduced medically needy income standard results in an increase in the family's monthly liability for medical expenses. See Pet.Br. at 7, n.3.

In 1982, when it passed the "single standard/same methodology" language of TEFRA, Congress specifically disapproved 42 CFR § 435.812 as amended and mandated HHS to return to the pre-1981 regulations. H.R. Rep. 97-757, Pt. 1, 97th Cong., 2nd Sess. 13 (1982) ("The Committee bill reaffirms the financial requirements previously in effect for the medically needy (42 C.F.R. sec. 435.800-435.845)"). *See Atkins v. Rivera*, 477 U.S. —, 91 L.Ed.2d 131, 142-43 (1986); *Hogan v. Heckler, supra*, 769 F.2d at 901. Thus, after TEFRA, HHS could not approve an adult couple MNIL set at 133⅓% of the AFDC grant for two persons, unless the standard for all medically needy families was set at that level.[13]

Petitioner contends that in DEFRA, Congress allowed states to establish adult couple MNILs set at 133⅓% of the AFDC grant for two, and to establish MNILs for other families of two below that amount. In order to accept that contention, one would have to find that Congress reversed its two-year old action without comment or explanation. This interpretation of DEFRA is improbable in the extreme: In fact, Congress intended to permit separate adult couple MNILs *only* if they were set *above* 133⅓% of the AFDC grant for two. *See* H.R. Rep. 98-442, *supra* (Br. in Opp., App. 20). Any other interpretation would be inconsistent with the stated purpose of the moratorium provision.

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[13]H.R. Rep. 98-442 reflects that understanding. By means of a detailed example, the House Committee emphasized that the proposed amendment would make no change in existing law: If a state set its MNIL for two adults at 133 1/3% of the AFDC grant for two, the income level for AFDC-related medically needy families would have to be the same. (Br. in Opp., App. 20).

In states such as California and Nebraska, the only two states proposing to adopt adult couple MNILs, the measure, as petitioner construes it, would not have improved the lot of the medically needy aged, blind and disabled, since, under 42 CFR § 435.814, in its 1980 version, the MNIL for those groups could not go below 133⅓% of the AFDC grant for two in any event.[14] Other states whose MNILs for two were set below 133⅓% of the AFDC grant for two were at all times free to raise the income standards to that level, without further congressional action. As petitioner interprets it, DEFRA would not have given states additionally flexibility to meet the needs of aged and disabled medically needy people, but would only have permitted them to lower the MNIL for other medically needy families. Yet, in enacting the moratorium, the Conference Committee explicitly stated that the moratorium was intended to allow only "less restrictive", not "more restrictive" standards and methodologies than those required under TEFRA. (Br. in Opp., App. 6).

The purpose of DEFRA's moratorium was to obviate the "great hardship for applicants and beneficiaries" caused by HHS' "overly restrictive interpretation of section 137[b](8) of TEFRA." H.R. Rep. 98-861 (Br. in Opp.,

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[14]For example, California provides Medicaid to aged and disabled recipients of state supplements. (See n.2, *supra*). The SSI/SSP grant amount is higher than 133 1/3% of the AFDC grant for a family of two. Thus, under 42 CFR § 435.814(b) (1980), the MNIL for all medically needy families of two could not fall below the latter amount.

App. 5).[15] With respect to adult couple MNILs, Congress intended to reject the policy set out in HCFA's communication of April, 1983, and to do, on a temporary basis, what the House had proposed to do permanently—to "relax the single standard requirement only in the limited circumstance in which a State sets its medically needy income level for two adults in excess of 133⅓ percent of the highest [AFDC] cash payment ordinarily made to a family of two".[16]

II. UNDER 45 CFR § 201.3(d), CALIFORNIA COULD PROPERLY FORMULATE ITS ADULT COUPLE MNIL IN ACCORDANCE WITH ROM 2572-D, A VALID GUIDELINE PROMULGATED PURSUANT TO THE SECRETARY'S DELEGATION OF AUTHORITY TO HCFA

"[T]his Court reviews judgments, not opinions, . . ." *Chevron, U.S.A., Inc. v. Natural Resources Defense Coun-*

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[15]Petitioner haltheartedly contends that the moratorium was intended to apply only to existing state plans, and not to plan amendments submitted after passage of DEFRA (Pet.Br. at 46, n.19), a contention resoundingly rejected in the court below. (Pet.App. 18a). The last sentence of the conference committee report, stating the conferees' expectation that states "will be reasonable" in establishing less restrictive standards and methodologies, completely undermines petitioner's argument. (Br. in Opp., App. 6). *See also* H.R. Rep. 100-85, Pt. 1, 100th Cong., 1st Sess. 22-25 (1987); S.Rep. 99-520, 99th Cong., 2d Sess. 20 (1986) (both expressly repudiating HHS' position).

[16]The fact that DEFRA was, in its overall outlines, a budget reduction measure does not lend support to the Secretary's argument. In other provisions of DEFRA, Congress expanded Medicaid coverage. *See, e.g.*, § 2361 (expanding coverage for pregnant women and children); §2362 (insuring immediate coverage for eligible newborn children). And in the moratorium provision itself, Congress gave the states full authority to use less restrictive standards and methodologies than those used in the cash assistance programs, with the sole limitation that "the States will be reasonable. . . ." (Br. in Opp., App. 6).

cil, Inc., 467 U.S. 837, 842 (1984). Although the court below gave ROM 2572-D "legislative effect," it could well have rested its judgment upon the ordinary deference which this Court and the courts of appeals have given similar regulatory material. Had it done so, the only question would have been whether the ROM provision is consistent with the statute and reasonably related to the purposes of Title XIX—a question which the court decided correctly. The judgment below should be affirmed on that more limited ground.[17] *See Los Angeles v. Preferred Communications, Inc.*, 476 U.S. —, 90 L.Ed.2d 480 (1986); *Chicago Teachers Union v. Hudson*, 475 U.S. —, 89 L.Ed.2d 232 (1986) (both affirming court of appeals on narrower grounds).

A. California Could Properly Rely on ROM 2572-D Although It was Not Promulgated in a Formal Rulemaking Proceeding

HHS administers both the Medicaid and the Medicare programs by means of a multitude of informally promulgated instructions and guidelines. The courts have frequently held that these regulatory materials are entitled to deference, so long as they are consistent with the statute and the agency's regulations. *See, e.g., Charter Peachford Hospital, Inc. v. Bowen*, 803 F.2d 1541, 1546-47 (11th Cir. 1986) (Medicare provider manual); *Wisconsin Dept. of Health and Social Services v. Bowen*, 797 F.2d 391, 397-98

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[17] In the court below, no party ever urged that ROM 2572-D is a legislative regulation. Rather, all conceded that the provision is an interpretative guideline. The parties differed only as to its substantive validity. Here, as in the Ninth Circuit, respondents contend only that ROM 2572-D is a valid interpretative guideline upon which California was entitled to rely pursuant to 45 CFR § 201.3(d).

(7th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3493 (U.S., Jan. 20, 1987) (No. 86-648) (HCFA Medicaid action transmittals); *St. Mary's Hospital v. Blue Cross and Blue Shield Ass'n.*, 788 F.2d 888, 890 (2d Cir. 1986) (Medicare provider manual); *Sun Towers, Inc. v. Heckler*, 725 F.2d 315, 325 n.16 (5th Cir.), *cert. denied*, 469 U.S. 823 (1984) (same). This Court has specifically sanctioned deference to such interpretations: "[R]ulings, interpretations and opinions . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[18]

There are several particularly strong reasons to defer to ROM 2572-D. First, the provision was issued by HCFA,[19] a "principal operating component" of HHS, 42 Fed. Reg. 13262 (Mar. 9, 1977), to which the Secretary has delegated "the authority vested in [him] under Title XIX" of the Act. 42 Fed. Reg. 57352 (Nov. 2, 1977). HCFA "provides operational direction and policy guidance for the nationwide administration" of the Medicaid program. 46 Fed. Reg. 56911 (Nov. 19, 1981). To that end, it has authority to promulgate policy issuances short of formal regulations. *Id.* at 56912 ("Within broad [HHS] policy and guidelines, the Administrator [of HCFA] oversees the establishment of program goals and objectives and the development of

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[18]On occasion, the Secretary has urged the courts to give informally promulgated Medicaid and Medicare regulatory materials even greater deference, citing the extreme complexity of those programs. *See, e.g., Wisconsin Dept. of Health and Social Services v. Bowen, supra*, 797 F.2d at 394-95.

[19]The guideline was actually first promulgated in June, 1977 by the Medical Services Administration. (See n. 21, *infra*). HCFA reissued it two years later. (J.A. 18, 21).

policies, standards and guidelines''). *See also id.* (HCFA's Office of Executive Operations ''coordinates the preparation of manuals and other policy issuances'' . . .); *id.* at 56929 (Bureau of Program Policy, subsequently renamed BERC [48 Fed. Reg. 512, 514-15 (Jan. 5, 1983)] ''reviews existing policy and develops new policy concerning eligibility . . . for the Medicaid program [and] develops regulations and other policy issuance for these areas'').

Second, the ROM provision interprets § 1903(f) of the Act, which delegates to the Secretary the power to set standards as necessary to implement the statute. § 1903 (f)(1)(B)(i). Nowhere did Congress indicate that all of those standards were required to be set out in formally promulgated regulations, or that informally promulgated interpretative regulations were inappropriate. Moreover, both the statute and the Secretary's regulations create an ambiguity by referring to the highest amounts ''ordinarily'' paid to families of the same size under the AFDC program. HCFA acted well within the terms of its authority in issuing guidelines to address the fact that states do not ''ordinarily'' pay AFDC benefits to families of two adults. (See pp. 29-30, *infra*).

Most importantly, the Secretary's own regulations specifically instruct states to look to informally promulgated ''guidelines'' in formulating their state plans. 45 C.F.R. § 201.3(d) (Br. in Opp., App. 2). States must be able to assume that such interpretative materials are valid and binding, unless and until they are repealed or a court declares them invalid. *See Alcaraz v. Block*, 746 F.2d 593, 614 (9th Cir. 1984) (''[A]ll rules are 'binding' on the regulated parties in the sense that they set, for the time, the legal minima of behavioral standards.'') While provisions

found in agency manuals may lack the force of law, the Secretary himself has endowed guidelines governing the content of state plans with particular significance.

Despite 45 CFR § 201.3(d), petitioner contends that the State should not have relied upon the ROM provision although it was published in the CCH Medicare & Medicaid Guide, (1980 Transfer Binder ¶30,392 at 9521), along with a variety of other similar interpretations relating to standards for approval of state plans.[20] He relies upon the foreword to the Regional Office Manual.

The ROM foreword is a particularly unreliable foundation for petitioner's argument. It was signed at an unknown date by the Director of the Bureau of Health Insurance, (Pet.App. 29a), a component of the then Department of Health, Education and Welfare which existed only until early 1977, and which was responsible only for administration of the Medicare, not the Medicaid, program.[21] 33 Fed. Reg. 5834 (April 16, 1968). Assuming that, under BHI's tenure, HEW employees dealing with Medicare questions were in fact instructed not to disclose the contents of the manual to persons outside HEW's regional offices, there is no way of knowing to what use

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[20]The table of contents to the 1980 Transfer Binder lists 21 ROM sections published therein, some with several subparts. Each is introduced by the sentence, "HCFA has issued guidelines reproduced below . . . ." Similarly, the 1979-2 Transfer Binder contains 35 sections of the ROM.

[21]The Medicaid program was administered by the Medical Services Administration. 40 Fed. Reg. 4670 (Jan. 31, 1975). Both components were transferred to HCFA upon HEW's reorganization in 1977, two years before HCFA reissued ROM 2572-D. 42 Fed. Reg. 13262 (March 9, 1977).

the ROM, as a whole, was put after 1977.[22] And, while the foreword's instructions not to disclose the contents of the manual arguably might make sense in the context of the Medicare program, which is not administered by the states and which requires no state plans, those instructions plainly conflict with 45 CFR § 201.3(d) insofar as the manual contains guidelines for Medicaid state plan review.

Indeed, the Secretary's contention that the ROM was for internal use only during the period pertinent to this case, when examined in light of the contents of ROM 2572-D and of the Manual's other published guidelines, is truly remarkable. The published interpretations cover a wide variety of subjects of vital interest to the states: Questions concerning Medicaid eligibility requirements (CCH Medicare and Medicaid Guide, 1980 Transfer Binder ¶30,392); issues regarding state organization and administration of Medicaid programs, (*id.*, ¶s 30,339-30,391; 1979-2 Transfer Binder ¶30,124); federal reimbursement for staffing and training costs, (*id.*, ¶30,125); and permissible limitations on the scope of coverage of various services, (*id.*, ¶29,997; 1980 Transfer Binder ¶s 30,393-30,395), to name but a few. The thrust of the Secretary's argument is that HHS can review state plans and decide whether to approve them on the basis of "secret law" which has not been and may not be disclosed to the states. If the Ninth Circuit

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[22]There is no copy of the foreword in the record. The hearing officer took judicial notice of it without giving prior notice to the parties, without providing respondents a copy, and without giving them an opportunity to take evidence upon the uses of the manual after 1977. This unorthodox procedure explains the lack of a record regarding the means by which certain of the ROM's provisions came to be published in the CCH Medicare and Medicaid Guide.

had so held, that, indeed, would have been a ruling which would merit reversal. In contrast, the Ninth Circuit's holding that California could rely upon the ROM, particularly in view of 45 CFR § 201.3(d), is hardly controversial, much less "revolutionary". (Pet.Br. 19).

Nor does the judgment below conflict with *Schweiker v. Hansen*, 450 U.S. 785 (1981). That case involved a claim that HHS was estopped from requiring a written application for SSI benefits due to its employee's failure to comply with a provision of an internal manual requiring him to advise the plaintiff that she should complete one. This Court there held that the manual did not have the force of law, and thus could not override statutory and regulatory provisions requiring all SSI applications to be in writing. *Id.* at 789. Here, however, 45 CFR § 201.3(d) clearly envisions that, in drafting their Medicaid plans, states may take into account interpretative guidelines promulgated by HCFA pursuant to its delegated authority to administer the Medicaid program. This regulation is binding upon the Secretary, so long as the guideline in question is consistent with the Act and the Secretary's regulations, as ROM 2572-D is. (See Part II(B), *infra*.)[23]

Finally, petitioner asserts here, as he did for the first time in a footnote to his petition for rehearing in the court below, (Reh. Pet. at 9 n.3), that ROM 2572-D was eliminated from a 1980 revision of the ROM and was thereby repealed. As petitioner notes, repeal is a fact, (Pet.Br. at

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[23]A claim based upon an agency's regulations does not raise an issue of estoppel. *See Lyng v. Payne*, 476 U.S. —, 90 L.Ed.2d 921, 931-32 (1986). Petitioner's discussion of that doctrine (Pet.Br. at 38-41) is simply irrelevant.

38), and there is no evidence whatsoever of this "fact" in the record before this Court—indeed, the record is to the contrary. Certainly, Congress was not made aware that ROM 2572-D had been "repealed" in 1980 when it considered the validity of that provision in 1983-84. And HCFA's April, 1983 "Policy Information for All Regions" letter, issued by the Director of the BERC, stated that the ROM provision had *not* been repealed. (Br. in Opp., App. 13-14). "[T]his Court decides cases based on the record before it." *Wygant v. Jackson Bd. of Education*, 476 U.S. —, 90 L.Ed.2d 260, 271 n.5 (1986).

Generally, a "statement of general policy or interpretation of general applicability" such as ROM 2572-D must be repealed through a notice in the Federal Register. 5 U.S.C. § 552(a)(1)(D). *See Cabais v. Egger*, 690 F.2d 234, 238 n.8 (D.C. Cir. 1982); *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977); *St. Elizabeth Hosp. v. United States*, 558 F.2d 8 (Ct.Cl. 1977) (all requiring publication of interpretative rules). *Cf. Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216 (D.C.Cir. 1983) (APA applies to repeal of regulation). At a minimum, notice must be given in a manner calculated to advise those who previously relied upon the regulation that it has been repealed. *See* 5 U.S.C. § 552(a)(1) ("Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.")[24] No notice, in the Federal Register or otherwise,

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[24]Given the circumstances of this case and this provision of the FOIA, the court below was clearly correct in its assertion that the original failure to publish ROM 2572-D in the Federal Register did not affect its validity. (Pet.App. 15a)

was ever given regarding repeal of ROM 2572-D. Thus, unless the provision was inconsistent with Title XIX or the Secretary's regulations, California was entitled to base its adult couple MNIL on the formula set forth in ROM 2572-D.

B. ROM 2572-D Is Consistent With § 1903(f) and With HHS' Regulations

Petitioner insists that ROM 2572-D is invalid because it is inconsistent with § 1903(f) and with 42 C.F.R. § 435.1007. He ignores the fact that the giudeline fills a gap in both the statute and the regulation, and is consistent with both.

Section 1903(f)(1)(B)(i) provides: "[T]he applicable income limitation with respect to any family is the amount determined, *in accordance with standards prescribed by the Secretary*, to be *equivalent* to 133⅓ percent of the highest amount which would *ordinarily* be paid to a family *of the same size*" under the AFDC program. (Pet. App. 46a) (emphasis added). Petitioner contends that the meaning of this provision is self-explanatory. (Pet.Br. at 19). But Congress evidently did not think so: "Congress itself must have appreciated that the meaning of the statutory term was not self-evident, or it would not have given the Secretary the power to prescribe standards." *Batterton v. Francis*, 432 U.S. 416, 428 (1977). As the Court of Appeals noted, this provision does not contemplate "a mathematical procedure," but allows latitude for the Secretary to develop standards for "equivalent" MNILs. (Pet. App. 7a). *See also Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (when Congress used language of delegation such as that in § 1903(f), it "con-

ferred on the Secretary exceptionally broad authority to prescribe standards" implementing the Act).

Petitioner concedes that Congress' delegation to set standards was designed to address "certain situations . . . in which a MNIL must be determined for a medically needy family for which the state's AFDC plan may have no counterpart . . . ." (Pet.Br. at 28).[25] As HCFA recognized in ROM 2572-D, in setting MNILS for adult couples, states are faced with precisely such a situation. Section 1903(f) directs states to base their MNILs upon "the highest amount which would *ordinarily* be paid to a family of the same size" under the states' AFDC plans. However, states do not ordinarily pay AFDC grants to families of two adults; a state's AFDC payment level for a family of two is ordinarily based upon the needs of one adult and one child. *See* 42 U.S.C. § 606(b) (AFDC defined as "money payments with respect to a dependent child or dependent children"). Nor does the Secretary's regulation resolve this ambiguity, despite his insistence to the contrary: Rather, it simply repeats the statutory formula. 42 CFR § 435.1007(a)(1). *See also* 42 CFR § 435.811(c) (referring to the "highest money payment that ordinarily

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[25]Referring to § 1903(f)(1)(B)(ii), which independently authorizes the Secretary to make "adjustments", and § 1903(f)(3), which itself creates an exception to mathematical parity, petitioner argues that these situations are all "specified by statute." (Pet.Br. at 28). He does not explain the reason for the separate delegation to prescribe standards contained in § 1903(f)(1)(B)(i), for good reason: Far from providing "compelling support" for his position, (Pet.Br. at 23), the legislative history is silent as to the purpose of that delegation, and thus in no way detracts from the broad authority granted to him under the terms of the statute itself.

would be made in the State AFDC program to a . . . family of comparable size").

In ROM 2572-D, pursuant to the authority delegated to it by the Secretary (pp. 22-23, *supra*), HCFA recognized that, given the differing needs of a family consisting of two adults compared to those of a parent and child, an aged and disabled medically needy adult couple is not a "family of the same size" as an AFDC-linked family of two. HCFA's guideline resolved the ambiguity in the statute and the regulation by permitting the states "to effectively acknowledge the greater maintenance needs of an adult as opposed to those of a child" through adult couple MNILs. The guideline, moreover, remained true to Congress' intent in enacting § 1903(f): The ROM's formula is "firmly linked" to the AFDC grant levels, rather than to the higher SSI/SSP grant amounts paid to the categorically needy. (Pet.Br. at 24).

Thus, neither the language of the statute nor its legislative history lends support to petitioner's contention that ROM 2572-D was void *ab initio*. In any event, if there were any doubts which may have existed concerning the validity of the guideline prior to 1984, Congress approved HCFA's interpretation when it enacted the DEFRA moratorium. The House explicitly found, (Br. in Opp., App. 19), and the Conference Committee implicitly assumed that the policy set out in ROM 2572-D was "sound." See pp. 15-16, *supra*. The Conference Committee differed with the House only in its solution to the problem created by TEFRA: The House would have permanently "relax[ed] the single standard requirement only in the limited circumstance" in which a state adopts an adult couple MNIL in excess of 133⅓% of the AFDC grant for two

(App. 20); the Conference Committee refused permanently to "relax the single standard requirement" in this limited respect, but rather proposed a temporary moratorium, during which states are free to adopt a variety of "less restrictive" standards and methodologies, including adult couple MNILs such as California's.[26] Where, as here, Congress " 'has ratified [an administrative construction] with positive legislation,' we cannot but deem that construction virtually conclusive." *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. —, 92 L.Ed.2d 675, 690 (1986).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[26] In his reply to the brief in opposition, petitioner attempts to refute respondents' argument by relying upon post-DEFRA legislative history. S.Rep. 99-520, *supra* (Pet.Rep.Br. at 8, n.3). That committee report, which postdates the decision of the court below by nearly eight months, neither repudiates that decision nor disapproves ROM 2572-D's interpretation of § 1903(f). And a more recent committee report reaffirms that, under the moratorium, "a State plan or policy could establish less restrictive medically needy income levels for an SSI-related elderly couple than is allowed to [a] two-person AFDC-related household. H.R. Rep. 100-85, *supra*, at 25.

APPENDIX A

42 CFR § 435.814 (1980) provided, in relevant part:

Medically needy income standard for two persons.

(a) Except as provided in paragraphs (b) and (c) of this section, the agency must use an income standard to determine eligibility for two persons that at least equals the highest of the following amounts:

(1) The amount of the payment standard for a family of two that is generally used to determine eligibility under the State's approved AFDC plan.

(2) The amount of the income standard used to determine eligibility under SSI of a couple in which both spouses apply as aged, blind, or disabled and live in the same household.

(3) If the agency provides Medicaid, under § 435.230, to individuals receiving only optional State supplements, the amount of the highest income standard generally used to determine eligibility for an optional State supplement for couples in which both spouses apply as aged, blind, or disabled and live in the same household.

(b) An agency may use a lower income standard for two persons if—

(1) The income standard used under paragraph (a) of this section exceeds the maximum dollar amount on income allowed for purposes of FFP under § 435.1007; and

(2) The lower income standard at least equals the maximum amount allowed for purposes of FFP.

APPENDIX B

42 CFR § 435.812 (1981) provided, in relevant part:

Medically needy income standards: Reasonableness.

(a) The agency must use a medically needy income standard that is reasonable.

(b) The following medically needy income standards are presumed to be reasonable:

(1) The agency provides one medically needy income standard for all covered medically needy groups. Except as provided in paragraphs (c) and (d) of this section, the standard must at least equal the highest income or payment standard used to determine eligibility in the cash assistance programs (or an optional State supplement, if the agency provides Medicaid under § 435.230) related to the covered medically needy groups.

(2) The agency provides a different medically needy income standard for each covered medically needy group. Except as provided in paragraphs (c) and (d) of this section, the standard for each covered group must at least equal the income or payment standard used to determine eligibility in the cash assistance program (or an optional State supplement, if the agency provides Medicaid under § 435.230) related to that covered medically needy group.

(c) The agency may use a lower medically needy income standard than the standards specified in paragraph (b) of this section if—

(1) The income standard used under paragraph (b) of this section exceeds the maximum dollar amount on income allowed for purposes of FFP under § 435.1007; and

(2) The lower income standard at least equals the maximum amount allowed for purposes of FFP.